

**DELTA VISION BLUE RIBBON TASK FORCE
MEETING OF APRIL 24 AND 25, 2008**

**SUMMARY AND STATUS OF “OCAP SMELT AND SALMON” CASES
PENDING IN JUDGE WANGER’S COURT (AS OF 4/17/08)**

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BACKGROUND: There are currently pending before Judge Oliver Wanger in federal district court in Fresno, two cases challenging the validity, under the federal Endangered Species Act (federal ESA) and Administrative Procedure Act (APA), of biological opinions issued by federal fisheries agencies covering the ongoing, joint operating criteria and plan (2004 OCAP or OCAP) for the Bureau of Reclamation’s Central Valley Project (CVP) and the Department of Water Resource’s State Water Project (SWP).

The most recent version of the OCAP was prepared and issued June 30, 2004, to serve as an updated baseline description of the facilities and operating environment of the CVP and SWP. It identifies the many factors influencing the physical and institutional conditions and decision-making process under which the two projects jointly operate. Regulatory and legal instruments are explained; alternative operating models and strategies are described. It explains that water needs assessments have been performed for each CVP contractor, to confirm each contractor’s past beneficial use in order to anticipate future demands. Also provided is a review of the 1986 Coordinated Operating Agreement and how it is implemented on a daily basis by Reclamation and DWR, and a detailed overview of the changes in the operations coordination environment since 1986. The immediate objective of the OCAP—as described in its “Purpose” section-- is to lay out all such regulatory and other operational information necessary for a federal ESA, Section 7 consultation to evaluate how project operations will affect the relevant listed species under various projected future conditions.

In this regard, because listed species, including delta smelt and various salmon and steelhead species reside in the area affected by the CVP/SWP, the 2004 OCAP must comply with the federal ESA. Under that law, prior to authorizing, funding or carrying out any action, Reclamation—as the “federal action agency”-- must first consult with the applicable federal fisheries agency to “insure that the action is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification habitat of such species which is determined to be critical.” This “consultation” is usually initiated with the preparation of a biological assessment by the action agency of its proposed action and concludes with the issuance by the fisheries agency of a biological opinion. If the biological opinion concludes that jeopardy is not likely and that there will not be adverse modification of critical habitat, or that there is a reasonable and prudent alternative to the agency action that avoids jeopardy and adverse modification and that the incidental taking of listed species will not violate ongoing ESA duties, the federal fisheries agency can issue an “incidental take statement” which, if followed, exempts the federal action agency from ESA takings prohibitions.

The issuance of a biological opinion is considered final agency action for purposes of the APA, and subject to judicial review.

Each of the biological opinions at issue here—the first, covering Delta smelt, issued in February 2005 by the U.S. Fish & Wildlife Service; the second, covering listed salmon and steelhead species, issued in October 2004 by the National Marine Fisheries Service—had concluded that, with the incorporation of certain mitigation measures, operating the CVP and SWP as described in the OCAP would not jeopardize the continued existence of the relevant listed fish species or adversely modify their critical habitat. The biological opinions actually cover both “formal” and “early” consultation effects: the former including current day operations and several future facilities and actions, including renewal of long-term CVP water service contracts and future deliveries; the latter including effects of operations of components of the South Delta Improvement Program, including increased SWP pumping capacity from 6,680 cubic feet per second (cfs.) to 8,500 cfs., and eventually to 10,300 cfs.

A coalition of environmental and sportfishing organizations filed lawsuits in 2005 seeking to invalidate each of the biological opinions, alleging that their “no jeopardy” conclusions were arbitrary and capricious because they had, among other things, failed to consider the best available science with regard to declining fish populations, relied on uncertain and inadequate mitigation measures, and failed to consider impacts to critical habitat. The lawsuit challenging the OCAP delta smelt biological opinion is captioned NRDC v. Kempthorne. The lawsuit challenging the OCAP salmon and steelhead biological opinion is captioned PCFFA v. Gutierrez, and has a particular focus on alleged adverse impacts to species and habitat caused by changes to cold-water temperature management (i.e., elimination of Shasta Dam carryover storage requirement and movement of temperature compliance point on the Sacramento River).

Subsequent to the initiation of these lawsuits, Reclamation reinitiated consultation with the federal fisheries agencies on both of the biological opinions, citing new scientific and other information, and stated that new biological opinions would be completed in 2008. Reclamation (joined by DWR as an intervening party) petitioned Judge Wanger to dismiss, or in the alternative, stay the lawsuits in light of the reinitiated consultation, or at a minimum, to join the two lawsuits in light of common issues. These motions were unsuccessful, and the cases proceeded to hearings on cross-motions for summary judgment.

OCAP SMELT CASE– NOTABLE ACTIONS AND CURRENT STATUS

1. Summary Judgment Order. On May 25, 2007, Judge Wanger issued a summary judgment order invalidating the biological opinion for delta smelt, finding it unlawful and inadequate on the following grounds: (1) uncertain mitigation measures; (2) failure to use best available science, including failure to address the issue of climate change; (3) flawed approach to setting take limits; and (4) inadequate consideration of impacts to critical

habitat. Judge Wanger found that, under the federal APA, the biological opinion's "no jeopardy" finding was arbitrary, capricious, and without rational connection to the status of the delta smelt, which he described as "undisputedly in jeopardy as to its survival and recovery."

Because the biological opinion was invalidated, Judge Wanger ruled that an appropriate interim remedy must be implemented, but that it was not prudent to impose such a remedy without further input from the parties.

2. Interim Remedial Order. A seven-day evidentiary hearing was held on August 21-24 and 29-31, 2007, to determine what interim remedies to impose. Judge Wanger ruled from the bench at the conclusion of that hearing, and, in December 2007, followed-up with his Final Interim Remedial Order.

First, he ordered the smelt biological opinion remanded (without "vacatur," to avoid the potentially draconian consequences of operating the CVP/SWP without incidental take authority) to USFWS to prepare by September 15, 2008, a new opinion on the effects of the operation of the CVP and SWP upon the delta smelt. Next, Judge Wanger issued a preliminary injunction restraining Reclamation and DWR from taking actions inconsistent with a suite of interim remedial measures the judge ordered based upon proposals submitted by the parties. Those measures include enhanced delta smelt surveys, monitoring, and sampling, operational flow restrictions from late December 2007 through June 2008 (designed to limit net upstream, or "reverse" flow in Old and Middle Rivers), continued implementation of the Vernalis Adaptive Management Plan, and prohibitions on temporary barrier installation.

Finally, to prevent an "irreversible or irretrievable commitment of resources" under ESA Section 7(d) pending completion of a new biological opinion, the Order provides that Reclamation: (a) will not execute any long-term water service contracts with CVP contractors until the new opinion is completed; (b) will not implement new construction and long-term projects in the Delta (including the South Delta Improvement Project, Intertie Program, Lower American River Flow Standards, and the Long-Term Environmental Water Account) until the new opinion is completed; (c) will not increase exports from the south Delta and will operate Jones Pumping Plant within recent historical limits; and (d) will commit resources and staff to the continuing study of the pelagic organism decline in the Delta.

The Final Interim Remedial Order will continue in effect until completion of the reconsultation on the OCAP and issuance by USFWS of a new OCAP delta smelt biological opinion on or before September 15, 2008. USFWS is required to file with the court by April 30, 2008, a status report on the progress of the new biological opinion.

DWR has issued several news releases describing practical impacts, to date, of pumping curtailments necessary to comply with the Interim Remedial Order. According to a recent DWR news release (3/26/08), although there has been a return in 2008 to average

snowpack conditions, because of mandated pumping curtailments, the SWP is projected to deliver only 35 percent of requested amounts this year to communities, farmers and businesses in the Bay Area, Central Valley, and Southern California. An earlier DWR news release (3/13/08), announcing further delta pumping cutbacks in response to then concerning levels of increased salvage of smelt at the pumps, projected that water deliveries will be reduced up to 30 percent this year because of the court order. It stated that, with the further cutbacks, the SWP will reduce exports from about 2,000 cfs. to about 1,500 cfs., and that normally, this time of year with current water conditions, SWP pumping would be about 8,000 cfs. The release also noted that to meet demands, DWR will begin to draw water from San Luis Reservoir at least a month earlier than it normally would.

3. Alleged Ongoing ESA Violations. On April 8, 2008, Plaintiff's filed their Third Supplemental Complaint for Declaratory and Injunctive Relief, alleging, in essence, that Reclamation's decision to renew various long-term water delivery and settlement contracts (including the Delta-Mendota Canal Unit Contracts, 138 of the Sacramento River Settlement Contracts, the Natomas Central Mutual Water Company Sacramento River Settlement Contract, and the City of Redding and the Anderson-Cottonwood Irrigation District Sacramento River Settlement Contracts) based on what it should have known was a facially inadequate smelt biological opinion, and its continuing performance under those contracts even after the biological opinion was invalidated by Judge Wanger, constitute ongoing violations of the federal ESA. Plaintiffs are seeking an injunction requiring Reclamation to cease performance under the renewed contracts, and an order requiring them to renegotiate and re-execute those contracts only upon completion of a new, lawful smelt biological opinion.

This latest iteration of the complaint comes on the heels of Judge Wanger's order of January 23, 2008, on motions to dismiss plaintiff's previous version of the complaint, and, as instructed by the judge's order, joins as defendants, an additional 34 parties, having an in interest in the renewal contracts at issue.

The remaining schedule for this portion of the case (subject to court modification) is as follows:

May 8, 2008—Defendants to file responses to 3rd supplemental complaint
May 16, 2008—Defendants to lodge and certify supplemental administrative record
June 10, 2008—summary judgment motions/motions on administrative record due
June 30, 2008—oppositions to summary judgment motions due
July 15, 2008—replies to cross-motions for summary judgment due
July 28, 2008—tentative hearing date on summary judgment motions

A further status conference is set for May 16, 2008, to discuss pending motions and the pleadings.

OCAP SALMON CASE—NOTABLE ACTIONS AND CURRENT STATUS

1. Summary Judgment Order. On April 16, 2008, Judge Wanger issued a summary judgment order invalidating the salmon and steelhead biological opinion, finding it unlawful and inadequate on the following grounds: (1) failure to explain contradictory evidence as to the survival and recovery of all three species; (2) failure to analyze the adverse effect and modification on the critical habitat of the three species; (3) inadequate analysis on the three species' life cycles and population dynamics; (4) need to properly complete incremental project impact analysis in relation to baseline conditions; and (5) failure to address the issue of global climate change and its effects on the hydrology of Northern California rivers.

Judge Wanger ruled that the biological opinion, consequently, must be remanded to NMFS and Reclamation for further consultation in accordance with law (which, as noted above, is already ongoing) and that Reclamation must continue to take no actions during reconsultation that make any irreversible or irretrievable commitment of resources which forecloses the formulation or implementation of reasonable and prudent alternative measures.

Judge Wanger ordered plaintiffs to submit a proposed form of Order within 5 days (or April 21st), and he set a scheduling conference for the afternoon of April 25th. to address interim remedies and whether the remand should be without “vacatur” (similar to his remand order in the Smelt case).

2. Prior Ruling on NEPA Claim. Judge Wanger had ruled earlier in this case (6/15/07) that, contrary to plaintiff's allegations, the OCAP was not a “final agency action” by Reclamation for purposes of NEPA, and therefore did not trigger the need to prepare an environmental impact statement. By stipulation and order, plaintiffs have until 30 days after the summary judgment order (described in #1 above) is filed, to amend their complaint addressing any further NEPA claim.